STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

CHARTER TOWNSHIP OF COLOMA,

Plaintiffs-Appellee,

vs.

COUNTY OF BERRIEN, BERRIEN COUNTY SHERIFF'S DEPARTMENT, LANDFILL MANAGEMENT CO. and HENNESSY LAND CO.,

Defendants-Appellants,

Court of Appeals Docket No. 325226
Lower Court Case No. 13-0317-CZ-D
Berrien County Circuit Court

Supreme Court Docket No. 154556

JOE HERMAN, et al,

Plaintiffs-Appellees

vs.

BERRIEN COUNTY

Defendants-Appellants.

Court of Appeals Docket No. 325335
Lower Court Case No. 05-3247-CZ-M
Berrien County Circuit Court

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HERMAN PLAINTIFFS-APPELLEES' BRIEF ON APPEAL

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A. Whether the new open-air structure erected by the County on the gun range in 2013 constitutes a necessary county building within the meaning of the County Commissioners Act.

Defendants-Appellants answer, "Yes."

Plaintiffs-Appellees answer, "No."

The Trial Court answered, "Yes."

The Court of Appeals answered, "No"

B. Whether the land use of outdoor shooting on the gun range has priority over the Coloma Township Zoning Ordinance under the ancillary and indispensable test established by this Court in *Herman v Berrien County*, 481 Mich 352 (2008).

Defendants-Appellants answer, "Yes."

Plaintiffs-Appellees answer, "No."

The Trial Court answered, "Yes."

The Court of Appeals answered, "No."

II. WHETHER THE COURT OF APPEALS CORRECTLY REVERSED THE BERRIEN COUNTY CIRCUIT COURT'S MODIFICATION OF THE EXISTING PERMANENT INJUNCTION ORDER BASED "CHANGED CIRCUMSTANCES?"

Defendants-Appellants answer, "No."

Plaintiffs-Appellees answer, "Yes."

The Trial Court answered "No."

The Court of Appeals answered, "Yes."

III. WHETHER THE COURT OF APPEALS PROPERLY VACATED THE TRIAL COURT'S DECISION TO DENY THE PLAINTIFFS' REQUEST FOR ATTORNEY FEES PURSUANT TO MCL 600.1721?

Defendants-Appellants answer, "No."

Plaintiffs-Appellees answer, “Yes.”

The Trial Court answered “No

The Court of Appeals answered, “Yes”

JURISDICTIONAL STATEMENT

Plaintiffs—Appellees agree with the Defendants—Appellants' jurisdictional statement.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

I. INTRODUCTION AND OVERVIEW.

The question presented is whether the Legislature intended the grant of a limited siting power for "county buildings" such as courthouses, jails and clerks' offices in the County Commissioner's Act (CCA) to permit a county to engage in a land use prohibited by a local ordinance by erecting an incidental structure the sole purpose of which is to facilitate the land use. Appellees respectfully submit that the answer is no based on this Court's recognition in *Herman* that the Legislature intended to provide a limited siting under the CCA that does not extend to activities or land uses.

The Michigan Zoning Enabling Act (MZEA) authorizes townships to "regulate the use of land" within the township to meet its citizens needs for "places of residence, recreation, industry, trade, service, and other uses of land . . . ." MCL 125.3201(1) (emphasis added). Plaintiffs are Coloma Township residents who live, work and own businesses in close proximity to the shooting ranges constructed and utilized by Berrien County (the "County") at various times over the last thirteen years in violation of the Coloma Township Zoning Ordinance. Plaintiffs are the local citizens the Legislature intended to protect with respect to their places of residence, businesses and recreational pursuits when it enacted the Township Zoning Enabling Act (now the MZEA). Plaintiff Sarah Jollay testified as follows regarding the impact of the County's efforts to operate the shooting range:

> Q: What were you fearful of?
>
> A: I am fearful of the retaliation of the County. I'm fearful of gunfire escaping that range. I'm fearful the environmental damage that is being caused by use of that range. I'm fearful of the relationship between the County and the landfill.

* * *

Q: You're afraid that in retaliation that they will try to make the facility bigger?

A: Yes.

* * *

Q: And next you mentioned your fear of gunfire escaping from the training facility site?

A: Yes.

Q: And what do you base that concern on?

A: Bullet escapement from several ranges throughout the County over the course of this discussion since 2005 when it started.

* * *

Q: Okay. And the environmental issue mentioned, can you describe the fear that you have with respect to the environmental impact?

A: That there's never been a baseline environmental assessment. We are all on wells.

* * *

Q: ….Do your fears now include the fear of harm to your business as a result of the noise of the gunfire?

A: Yes.

* * *

Q: Do you fear that you're having to spend a lot of your personal resources to engage in this battle against Berrien County?

A: Yes.

Q: And in connection that fear, do you fear that all of it could be for nothing, you may end up winning, you may end up losing.

A: Yes.

(Deposition Transcript of Sarah Jollay, pp. 25, 27-28, 46-48) **(Appendix 9b, 14b)**. As outlined in the foregoing testimony, the County's use of the ranges for outdoor shooting frustrates the

purpose of the MZEA and the township's ability to provide for its citizens' needs for "places of residence, recreation, industry, trade, service, and other uses of land."

In *Dearden v City of Detroit*, 403 Mich 257; 269 NW2d 139 (1978), this Court held that legislative intent, where it can be discerned, determines whether a governmental unit is subject to a local zoning ordinance. *Dearden*, 403 Mich at 265. This Court later held, in *Pittsfield v Washtenaw County*, 468 Mich 702; 664 NW2d 193 (2003), that a County's power to site and erect a homeless shelter pursuant to MCL 46.11(b) and (d) of the County Commissioner ("CCA") had priority over a conflicting township ordinance. *Pittsfield*, 468 Mich at 711. In so holding, the *Pittsfield* Court relied primarily on the statutory interpretation rule of *expressio unius est exclusion alterius* based on a 1998 amendment of the CCA that limited the County's siting authority if there is any other requirement that the county buildings be located in the county seat. *Id*. at 711. In sum, *Dearden* and *Pittsfield* establish that legislative intent controls whether a governmental unit is subject to a local zoning ordinance.

In *Herman v Berrien County*, 481 Mich 352; 750 NW2d 570 (2008) this Court confirmed that a County's siting power under the County Commissioner Act ("CCA") only applies to the siting of county buildings such as courthouses, jails and clerk's offices. *Herman*, 481 Mich at 365. In so holding, the Court noted that it was "mindful of *Dearden's* overarching maxim: 'legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances." *Id* at 366. This Court found that the Legislature did not intend the CCA to permit a county to site activities or land uses in violation of a local zoning ordinance. *Id*. at 366-367. Specifically, the Court precluded the County from engaging in the land use of firearms training at the shooting ranges in question in violation of the Coloma Township Zoning Ordinance.

On remand, the trial court entered a Permanent Injunctive Order (the "Injunction") on November 10, 2008 prohibiting the County or its agents from utilizing the shooting ranges. The entry of the Injunction was the culmination of a costly and burdensome three-year legal battle for Plaintiffs. Plaintiffs justifiably expected that the County would comply with the Injunction and *Herman* opinion and the County initially met this expectation by ceasing outdoor firearms training after entry of the Injunction.

In August and September of 2013, approximately five years after the publication of the *Herman* opinion and entry of the Injunction, the County approved and erected a new open-air structure on one of the shooting ranges and pronounced the new structure a "shooting range building." It is undisputed that the County did not seek approval from the circuit court or relief from the Injunction prior to erecting the new structure. After completion of this new structure by the County, the Berrien County Sheriff's Department (BCSD) conducted firearms training on eight separate dates in September, October and November 2013 in clear violation of the Injunction. The County's brazen conduct in constructing and utilizing the structure to resume the same land use of firearms training prohibited by this Court in *Herman* and the subsequently entered Injunction once again plunged Plaintiffs into costly and burdensome litigation.

After learning the County had resumed firearms training at the shooting ranges in violation of the Injunction, Plaintiffs sought to enforce the Injunction through contempt proceedings. The circuit court's contempt power was Plaintiffs' only means of enforcing the Injunction. "[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned their authority." *Federalist Papers* # 78, Hamilton (1788). Plaintiffs came before the circuit court in November of 2013 for a second time asking the court to fulfill this purpose and utilize its

authority as a check on a governmental body that was clearly acting outside of the limits of its authority. Instead of enforcing the Injunction and awarding Plaintiffs' attorneys fees, the trial court rewarded the County's unlawful conduct and modified the Injunction to allow the County to continue engaging in a land use that violates the local township zoning ordinance.

The Court of Appeals' opinion remedies the trial court's failure to enforce the Injunction and erroneous application of *Herman*. Specifically, the Court of Appeals opinion correctly applies the *Herman* ancillary and indispensable test to preclude the County from siting a land use activity through the erection of an incidental superfluous structure. The Court of Appeals' opinion further remedies the trial court's failure to enforce the Injunction through its contempt powers by remanding for an award of attorney fees.

While Appellants would clearly prefer that the Court ignore the history of this case, the Court of Appeals correctly applied the "ancillary and indispensable" test in light of the facts and history of this case. The County has conceded that the new structure has no purpose outside of facilitating the outdoor activity of firearms training. The Court of Appeals' majority correctly concluded that utilization of the shooting ranges for firearms training cannot constitute an ancillary land use under *Herman* where it is clear that the County erected the structure for the sole purpose of siting and resuming a pre-existing land use activity. Put another way, the Court of Appeals correctly applied the *Herman* holding that a County's siting power under the CCA includes only land uses subordinate to the normal use of a county building and that firearms training on the gun ranges is not subordinate to the new structure.

II. FACTS AND PROCEEDINGS.

In March of 2005, Berrien County entered into a 20-year lease with Landfill Management Company for property along Angling Road in Coloma Township (the "Angling Road Site").

(Amended Complaint, ¶ 18) **(Appendix 19b)**. The County proposed to construct four outdoor shooting ranges for the training and practice of the County Sheriff's Department and local law enforcement agencies at this location. *Id*. In October of 2005, Coloma Township unanimously agreed not to support the outdoor shooting ranges (Amended Complaint, ¶ 49). In November of 2005, the Berrien County Board of Commissioners ("BCBC") voted to approve the outdoor shooting ranges (Amended Complaint, ¶ 50) **(Appendix 23b)**.

On November 22, 2005, Plaintiffs filed their complaint. Count I of the complaint sought a declaratory judgment that defendant Berrien County and the four proposed shooting ranges were subject to the Coloma Township Zoning Ordinance. Both parties filed motions for summary disposition as to Count I of the complaint. The issue presented by these cross-motions was whether Berrien County's construction of the four shooting ranges was subject to the Coloma Township Zoning Ordinance. The trial court granted summary disposition in favor of the County finding that the County's intent to construct a building on the shooting range site gave the County priority over the Township ordinance.

Plaintiffs appealed the trial court's entry of summary disposition in favor of the County to the Court of Appeals. The Court of Appeals affirmed the trial court's opinion in a 2-1 opinion. *Herman v Berrien County*, 275 Mich App 382; 739 NW2d 635 (2007). Plaintiffs thereafter filed an application for leave to this Court, which subsequently granted the application. In a unanimous opinion, this Court reversed the judgment of the Court of Appeals and found that the County did not have priority over the Township zoning ordinance. *Herman v Berrien County*, 481 Mich 352; 750 NW2d 570 (2008). The *Herman* Court held that the County's power under the County Commissioner Act ("CCA") only applied to the siting of "county buildings" such as courthouses, jails and clerk's offices. *Herman*, 481 Mich at 365. The Court further found the

power to site "county buildings" included only ancillary land uses such as parking lots, sidewalks and light poles that are indispensable to the normal use of the building. *Id*. at 580-81. The *Herman* Court remanded the case to the circuit court for further proceedings.

On remand to the circuit court, the Berrien County Circuit Court entered a Permanent Injunctive Order (the "Injunction") providing as follows:

> NOW THEREFORE IT IS HEREBY ORDERED that Defendant, its agents, servants and employees, be and hereby is permanently enjoined from utilization of the shooting ranges heretofore constructed by it in Coloma Township, Berrien County, Michigan.
>
> IT IS FURTHER ORDERED that this injunctive order shall remain in full force and effect unless and until modified or terminated by this Court.

The copy of the Injunction entered in the clerk's office was signed "approved as to form" by R. McKinley Elliott in his capacity as counsel for the County. (2008 Permanent Injunctive Order) **(Appendix 5a-7a)**. Plaintiffs' former co-counsel Mark Westrate sent a copy of the signed Injunction to Mr. Elliott on November 17, 2008. (November 17, 2008 Correspondence to Elliott) **(Appendix 28b)**. Mr. Elliott is now a member of the Berrien County Board of Commissioners ("BCBC") and was Chairman of the Berrien County Administrative Committee ("BCAC") at the time the County violated the Injunction.

On February 11, 2010 the BCBC authorized the submission of a Special Land Use Permit ("SLUP") to Coloma Township seeking approval to operate the Angling Road Site as a "gun club" under the Coloma Township Zoning Ordinance. (Opinion and Order from Berrien County Circuit Case No. 12-0052-CZ-D dated January 28, 2013) **(Appendix 29b-56b)**. The County's application for SLUP was eventually considered and denied by the Coloma Township Zoning Board of Appeals ("ZBA") on January 12, 2012. *Id*. The County subsequently filed an appeal of the ZBA's denial of the SLUP in circuit court on February 14, 2012 (Berrien County Circuit

Court File No.12-0052-CZ-D). The circuit court affirmed the ZBA's decision in all respects except for the issue relating to interpretation of the term "gun club" in the Township zoning ordinance. *Id.* As a result, the Court remanded the case to the ZBA for purposes of definition of the term "gun club." *Id.* The ZBA subsequently defined the term "gun club" and the circuit court affirmed the ZBA's interpretation in an order entered on September 12, 2013.

In addition to the County's efforts to obtain a SLUP to operate a "gun club" at the Angling Road Site, Coloma Township became aware in February of 2010 that the BCSD had been using property owned by the Coloma Rod & Gun Club ("CRGC") for firearms training on a regular basis after the shooting ranges were closed in compliance with the Injunction. (Opinion and Order from Berrien County Circuit Case No. 10-0378-DH-D dated November 27, 2012) **(Appendix 8a-19a)**. Sometime after April 27, 2006 the CRGC constructed six outdoor shooting ranges on a parcel of property located approximately one half mile from the Angling Road Site (the "CRGC Site"). *Id.* At some point in 2008, the CRGC constructed two new berms on the CRGC Site without notifying Coloma Township. *Id.* After Coloma Township officials expressed concern that the construction of berms on the CRGC Site violated the Township zoning ordinance, the CRGC constructed four additional berms on the property. *Id.*

After the Township became aware that the BCSD had been using the CRGC Site for firearms training since February 2010 and that the CRGC had constructed six berms on the CRGC Site to accommodate this firearms training, the Township filed suit in Berrien County Circuit Court against the CRGC seeking to have the CRGC's berm construction and use of the site for firearms training declared a nuisance per se (Berrien County Circuit Court File No. 10-0378-CH-D). *Id.* In an opinion and order entered on November 27, 2012 the circuit court found

in the Township's favor finding that the CRGC's "construction and use of the six pistol bays . . . for the discharge of firearms . . . is a nuisance per se which I must abate." *Id.*

Faced with the imminent denial of its SLUP and enjoinment from using the CRGC Site for firearms training, on August 7, 2013 the BCBC directed the County Administrator to have what it described as a "shooting range building" constructed on one of the shooting ranges. (August 7, 2013 BCBC Resolution) (**Appendix 20a-21a**). This occurred nearly five years following the entry of the Injunction and publication of this Court's opinion in *Herman*. The resolution identifies R. McKinley Elliot as the chair of the BCAC. *Id.* In an affidavit dated November 21, 2013, Mr. Elliot conceded that he voted in favor of construction of the new structure "with the anticipated use of that one range by the Sheriff's Office for law enforcement firearms qualification training." (November 21, 2013 R. McKinley Elliott Affidavit) **(Appendix 57b-58b).**

Based on the above resolution, the County arranged for the construction of a rectangular structure consisting of a covered cement slab completely open on one long side and only partially enclosed by dividers on the remaining three sides:

In early September of 2013, the BCSD began utilizing the gun ranges for firearms training in clear violation of the Injunction:

On November 14, 2013 Plaintiffs a filed an ex parte motion asking the circuit court to enforce the Injunction and hold the County in contempt for violating the Injunction. On the same date, Coloma Township filed a new action in the circuit court seeking to enjoin the County and Berrien County Sheriff's Department from conducting outdoor shooting on the gun ranges in violation of the Coloma Township Zoning ordinance (Berrien County Circuit Court File No. 13-0317-CZ-D) (the "Township Case"). The Court subsequently entered a show cause order and scheduled a hearing for December 5, 2013. (November 14, 2013 Show Cause Order) **(Appendix 59b-60b)**. Prior to the show cause hearing, the County filed a motion seeking modification of the Injunction. The circuit court conducted an evidentiary hearing on December 5, 2013. At the time of the hearing, the Court entertained oral argument and several witnesses offered testimony including Berrien County Sheriff Paul Bailey and Undersheriff Chuck Heit.

The trial court quickly recognized that the new structure exists for no other purpose than to shield the siting of an unlawful land use when questioning the County's attorney:

MS HOWARD: The sole purpose of the building being built was to allow—

THE COURT: To get around the Herman decision.

* * *

THE COURT: Then why do you need a building? Why don't you just do it in the open, like they did before?

MS HOWARD: We—they could do that if it weren't for the fact that—

THE COURT: I'm searching here, Ms. Howard, for some reason this building exists other than to get around the Herman decision.

(Transcript of December 5, 2013 Hearing, p. 22, pp. 26-27 (emphasis added)) **(Appendix 62b-64b)**.

Sheriff Bailey conceded during his testimony that the structure would never have been erected but for the *Herman* opinion:

Q: So my question again: But for the Supreme Court's decision in Herman, you don't recommend that—to build this building?

A: Yes. We would need it if-if-

* * *

Q: So this—the siting of this building was to carry on the same use; correct?

A: The siting of this building was be—to be built so that we would conform with that what the courts allow us to do once the building was built.

Q: To engage in the use; correct?

A: Yeah, to be able to use it. Yes.

Q: For outdoor shooting?

A: Yes.

(*Id*. at 107) **(Appendix 66b)**. Both Sheriff Bailey and Undersheriff Heit confirmed that firearms training occurred at the shooting ranges in 2008 prior to the Supreme Court's opinion in *Herman* and that there were no structures on the shooting ranges at that time. Undersheriff Heit testified as follows:

Q: Did you have a building there before when you utilized that range?

A: No.

Q: Okay. So you could use the range-absent Herman,-

A: Right.

Q: -you can use the range without the building.

A: Prior-prior to, I believe, that cause, yes, we've done.

Q: You did it before.

A: Yes.

Id. at 76 **(Appendix 65b)**. Based on the foregoing, it is undisputed that firearms training occurred at the site prior to the *Herman* opinion in 2008 and that there was no structure on the shooting ranges at that time.

Finally, Sheriff Bailey conceded during his testimony that his department conducted firearms training at the shooting ranges in violation of the Injunction on at least eight occasions:

Q: In your affidavit you acknowledge that the sheriff's department used the range for firearms training on at least eight days. Is that consistent with your memory?

A: If that's what the affidavit says, yes.

Q: And those dates would be September 4, September 10, September 11, September 12, September 18, September 19, October 22 and November 6?

A: Yes.

(*Id*. at 113) **(Appendix 67b)**.

On January 17, 2014 the trial court issued an opinion and order granting the County's motion for relief from the Injunction and modifying the Injunction on a preliminary basis to allow for firearms training at the shooting ranges three days per week. (January 17, 2014 Opinion and Order) **(Appendix 68b-81b)**. Despite ordering the County to show cause regarding why it should not be held in contempt at the time of the December 5, 2013 hearing, the trial court

failed to make any ruling regarding Plaintiffs' contempt claims in the January 17, 2014 Opinion and Order.[1]

On March 28, 2014, the County filed a motion for summary disposition seeking dismissal of Plaintiffs' civil and criminal contempt claims. As part of this Motion, the County contended that it was entitled to governmental immunity with respect to Plaintiffs' claim for civil contempt. The County cited this Court's opinion in *In Re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013) to support its argument that it was entitled to governmental immunity. At the time of a hearing held on May 19, 2014, the trial court granted the County's motion in part and found that the County was entitled to governmental immunity under *Bradley Estate* with respect to Plaintiffs' civil contempt claim. The circuit court eventually entered an order reflecting this ruling on August 20, 2014. (August 20, 2014 Order) **(Appendix 82b-83b)**.

On August 4, 2014, Plaintiffs filed a motion for summary disposition as to the remaining contempt claims pending against the County. A hearing on Plaintiffs' motion occurred on August 25, 2014. At the time of this hearing, the trial court found that ruling on the criminal contempt claims required "credibility determinations" that could only be made in connection with a trial. (Transcript of August 25, 2014 Hearing, p. 4.) **(Appendix 86b)**. The trial court also ruled that it viewed the civil contempt claim as no longer viable due to the court's prior ruling that governmental immunity applied and the court's view that the County was currently in compliance with the modified Injunction. (*Id*. at 3-4) **(Appendix 85b-86b)**. The Court eventually entered an order regarding Plaintiffs' motion on September 9, 2014. (September 9, 2014 Order) **(Appendix 87b-88b)**.

[1] Following the initial proceedings discussed above, the circuit court treated the present case and Township case as consolidated for purposes of proceedings relating to whether the new structure constituted a "county building" under the County Commissioner Act and whether use of the new structure for outdoor shooting was appropriate under *Herman*.

On October 13, 2014, the trial court issued an opinion and order granting summary disposition in favor of the County and permanently modifying the Injunction to allow the County to conduct outdoor shooting on the one firing range containing the new structure. (October 13, 2014 Opinion and Order) **(Appendix 89b-100b).** In this opinion, the trial court found that the new structure constituted a "county building" under the CCA and that using the new structure for outdoor shooting satisfied the ancillary and indispensable test established by the Supreme Court in *Herman*. The trial court also issued a modified permanent injunctive order dated October 13, 2014. (October 13, 2014 Modified Permanent Injunctive Order) **(Appendix 101b-102b)**. On October 23, 2014, the Court issued a corrected opinion and order changing the word "civil" to "criminal" in the penultimate paragraph of page twelve of the original opinion and order. (October 23, 2014 Corrected Opinion) **(Appendix 65a-76a)**.

The circuit court conducted a bench trial on December 2, 2014 with respect to Plaintiffs' criminal contempt claim. A number of witnesses testified at the trial including Sheriff Paul Bailey, County Administrator Bill Wolf and Commissioner R. McKinley Elliott. Through these witnesses, the County presented the same ignorance defense it had presented at the time of the December 5, 2013 hearing to avoid responsibility for the clear violations of the Injunction between August and November of 2013. The County relied on the procedural technicality that no proof of service regarding the Injunction had been filed in November of 2008 and that, as a result, the County could not be held responsible for its clear violations of the Injunction.

While Mr. Elliott did his best to adhere to his "I don't recall" position at the time of the December 2, 2014 trial, he conceded that he was aware <u>in August of 2013</u> that an order had been entered in favor of Plaintiffs by the circuit court after remand from the Supreme Court:

> Q: So—so your testimony is that—that it could have been entered, but you did not recall it?

> A: My testimony is that I knew that Jude [sic] Dewane had entered an order when the case came back from the Supreme Court because I think that they remand cases and tell the trial court to do things consistent with the opinion of the court. And typically that means entering a decision for someone against someone. So I was aware of that.

(Transcript of December 2, 2014 Bench Trial, p. 15) **(Appendix 104b)**. Mr. Elliott further testified that he recalls discussing the Injunction with Plaintiffs' former co-counsel Mark Westrate and sending Mr. Westrate a signed signature page. *Id*. at 16 **(Appendix 105b).** Mr. Elliott further conceded that he would expect that the signature page would be attached to the order and filed with the court:

> Q: And if you had given a signature page and it was appended to an order, what would you expect to happen to that signature page and order?
>
> A: I would expect him to turn it in.
>
> Q: To—file it with the court?
>
> A: Sure.

Id. at 16-17 **(Appendix 105b-106b)**. Based on the foregoing, Mr. Elliott confirmed that he was aware in August of 2013 that the circuit court had entered an order after remand from the Supreme Court, that he now recalls discussing the Injunction with counsel for Plaintiffs and that he provided Plaintiffs' counsel with a signed signature page with the expectation that it would be attached to the order and filed with the court.

On December 10, 2014 the trial court issued an opinion and order acquitting the County of criminal contempt. (December 10, 2014 Opinion and Order) **(Appendix 116b-122b)**. This appeal followed.

LAW AND ARGUMENT

I. STANDARDS OF REVIEW.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Quinto v Cross and Peters Co*., 451 Mich 358, 362; 547 NW2d 314 (1996). A trial court's decision to grant summary disposition is reviewed on appeal *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999). A trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(7) on grounds of governmental immunity is reviewed de novo. *Roby v Mount Clemens*, 274 Mich App 26, 28; 731 NW2d 494 (2007). A trial court's decision regarding a contempt claim is reviewed for an abuse of discretion while the underlying factual findings are reviewed for clear error. *Arbor Farms, LLC v GeoStar Corp*, 305 Mich App 374, 386; 853 NW2d 421 (2014).

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE GUN RANGE DOES NOT HAVE PRIORITY UNDER THE COUNTY COMMISSIONERS ACT, MCL 46.11 *et seq*, SPECIFICALLY 46.11(b) AND (d) OVER COLOMA TOWNSHIP'S ZONING ORDINANCE.

A. The new structure erected by the County on one of the gun ranges in 2013 does not constitute a necessary county building under the County Commissioners Act.

If the new structure erected by the County does not constitute a "county building" within the meaning of the CCA, the gun range cannot have priority under the CCA. The Court of Appeals majority did not specifically address whether the new structure constitutes a "county building" under the CCA. The majority merely opined in a footnote that the dissent correctly resorted to a dictionary definition given the absence of a definition in the CCA. *Coloma Charter Twp. v Berrien County*, 317 Mich App, 127, 132, fn. 3; 894 NW2d 623 (2016).

Under *Dearden*, where legislative intent can be discerned, it guides the court's decision concerning whether a governmental unit is subject to a local zoning ordinance. *Dearden*, 403 Mich at 265. With respect to the scope of the type of buildings included in a County's siting power under the CCA, the Legislature provided evidence of intent by identifying specific examples of "county buildings." Specifically, the Legislature identified courthouses, jails and clerks' offices as the type of buildings within the scope of the category "county buildings." MCL 46.11 (a) & (d).[2] Since the Legislature's intent regarding the scope of the category "county buildings" can be discerned from the specific examples provided by the Legislature, the specific examples should guide the Court concerning what type of buildings fall within a County's limited siting power under the CCA. See *Dearden*, 403 Mich at 265.

One principal of statutory interpretation available to a court to ascertain legislative intent is the doctrine of *ejusdem generis*. This Court has described the doctrine of *ejusdem generis* as:

> a rule whereby in a statute in which general words follow a designation of particular subjects, the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated.

Sands Appliances Services, Inc. v Wilson, 463 Mich 231, 242; 615 NW2d 241 (2000) quoting *People v Brown*, 406 Mich 215, 221; 277 NW2d 155 (1979), quoting 73 Am Jur 2d, Statutes, § 214, pp 407-408.[3]

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[2] Appellants' Brief suggests that Appellees have improperly included "courthouses" as a type of "county building" identified by the Legislature in the CCA. Appellants' Brief, p. 11, fn 18. However, subsection (a) of MCL 46.11 explicitly provides that a county may "[p]urchase or lease for a term not to exceed 20 years, real estate necessary for the site of a courthouse, jail, clerk's office, or other county building in that county." MCL 46.11 (a) (emphasis added).

[3] The Court of Appeals' dissent contends that *ejusdem generis* does not apply because the phrase "county building" is utilized in subsection (b) before the designation of specific examples in subsection (d). *Coloma*, 317 Mich App at 159-160. Respectfully, the dissent overlooks the fact

The statutory provision at issue falls within the application of the doctrine of *ejusdem generis* because it contains general words following a designation of particular subjects. Specifically, the pertinent provision of the CCA gives the County the power to "erect the necessary buildings for jails, clerks' offices and other county buildings…." MCL 46.11 (d). Subsection (a) contains similar language with the addition of courthouses as an example of a "county building." MCL 46.11 (a). Under the doctrine of *ejusdem generis* the meaning of the general term "county buildings" should be restricted as including only things of the same kind, class, character or nature as the specifically designated terms courthouses, jails and clerks' offices. In *Herman*, this Court wrote that "the CCA expressly includes examples that uniquely fit into the category of buildings: courthouses, jails and clerks' offices…." *Herman*, 481 Mich at 367, fn 14 (emphasis added).

It is clear that the new structure erected by the County is not of the same kind, class, character or nature as a jail, courthouse or clerk's office. Jails, courthouses and clerks' offices are fully enclosed structures with walls, elevators, HVAC systems, bathrooms, indoor plumbing, electricity, doors (with locks) and windows and are all used for the conducting of indoor county business or services. The new structure erected by the County is a covered cement slab. The structure is not fully enclosed and has no complete walls, utilities, windows or doors. Further, the structure cannot be utilized for indoor county business or services as it is open to the elements and does not enclose a space within its walls. The structure simply does not "uniquely fit" into the category of county buildings within the meaning of the CCA and the Legislature's revealed through the specific examples of county buildings provided in the statute.

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that that subsection (a) lists the specific examples of jails, clerk's offices and courthouses prior to the use of the general term "county buildings" in subsection (a) or (b). MCL 46.11 (a).

Despite conceding that it is "a stretch" to consider the CCA *in pari materia* with the Government Tort Liability Act ("GTLA") the trial court relied on the Court of Appeals decision in *Ali v City of Detroit*, 218 Mich App 581, 585; 554 NW2d 384 (1996) to find that the new structure constitutes a "county building" under the CCA. The *Ali* opinion analyzes the meaning of the phrase "public building" from the public building exception of the GTLA. The public building exception provides that governmental agencies "are liable for bodily injury and property damage resulting from a danger or defective condition of a public building…" MCL 600.1406. The public building exception from the GTLA and the provision concerning siting of county buildings from the CCA are completely distinct statutory provisions with different purposes and, as such, the *Ali* opinion is irrelevant to the determination of whether the County's structure qualifies as a county building under the CCA.

As recognized by the *Herman* Court, the phrase "county building" refers to a unique category of buildings such as clerks' offices, jails and courthouses. Clerk's offices, jails and courthouses are fully enclosed structures with windows, doors, elevators, bathrooms, indoor plumping, electricity and HVAC systems and are utilized for conducting indoor county business and/or services. The structure at issue in this case does not fit within the unique category of "county buildings" as it is a covered cement slab erected for the sole purpose of resuming the prior unlawful outdoor land use of firearms training.

Moreover, the structure does not constitute a "necessary" county building under MCL 46.11(d). The term "necessary" from MCL 46.11(d) must be given some meaning to avoid rendering the term mere surplusage. *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541; 840 NW2d 743 (2013). In addition, the Legislature's inclusion of the term "necessary" provides evidence of legislative intent which must be considered in determining priority under *Dearden*

and *Pittsfield*. The word necessary is defined as meaning "absolutely needed." See Merriam-Webster Online Dictionary (www.merriam-webster.com/dictionary/necessary). When considering the plain meaning of the word "necessary" in the context outlined above, it is clear that the word was included as a limitation on the power to site county buildings and that, at minimum, the proposed county building must be necessary for the purpose it is allegedly erected to serve.[4]

It is beyond dispute that the new structure is not absolutely needed for outdoor firearms training on the gun ranges. In fact, the new structure actually undermines Sherriff Bailey's stated purpose for the alleged importance of outdoor firearms training. Sheriff Bailey's affidavit filed by the County prior to the December 5, 2013 evidentiary hearing states that "firearms training that occurs involving the outdoor elements (e.g. wind, heat, cold, humidity, rain, etc.) is a vital component of achieving adequately trained law enforcement officers." (Sheriff Bailey Affidavit) **(Appendix 33a-36a).** Utilizing the new structure for firearms training actually undermines the goal of simulating outdoor conditions as it protects the officers from the elements while they are shooting.

Moreover, it is undisputed that the County conducted firearms training on the shooting ranges prior to the erection of the new structure. In particular, before the County ceased utilizing the shooting ranges for firearms training in November of 2008 in accordance with the Injunction it had been conducting outdoor firearms training on the gun ranges for months. Sheriff Bailey and Undersheriff Heit both conceded during their testimony on December 5, 2013 that they could utilize the shooting ranges for firearms training absent any type of structure. As such, the

[4] For example, a jail building is necessary for detention of inmates. Similarly, a courthouse building is necessary for conducting judicial proceedings.

County's past conduct clearly demonstrates that the alleged county building is not necessary to conducting outdoor firearms training on the gun ranges.

Another fact that confirms the structure is not necessary is the lack of provision for any "gun range building" in the County's original plan for the shooting range facility. As noted by this Court in *Herman*, "the initial plans for the facility clearly indicate that the shooting ranges were the first and most prominent aspect of the facility to be constructed." *Herman*, 481 Mich at 356, fn. 3. If the structure is necessary to outdoor firearms training and the shooting ranges were the first and most prominent aspect of the facility to be constructed, one must wonder why the structure was not part of the original plans for the shooting facility. One must further wonder why the County never expressed an intent to erect such a structure until five years after the issuance of the *Herman* opinion. The fact that the County erected the structure eight years after approving plans for the training facility and more than five years after the *Herman* opinion is telling with respect to the question of whether the structure is necessary for the purpose it was erected to serve.

B. The Court of Appeals correctly applied *Herman* by concluding that the use of the gun range for firearms training is not an ancillary land use relative to the new structure.

In *Herman*, this Court recognized that the County Commissioner Act (CCA) gives counties the limited power to "[d]etermine the site for a county building" and to "[e]rect the necessary buildings for jails, clerks' offices, and other county buildings." *Herman*, 481 Mich at 366 citing MCL 46.11 (b) and (d). Importantly, this Court found the unambiguous statutory language of the CCA to reveal the Legislature's intent to limit the scope of the County's siting power under the CCA. This Court found that the "Legislature never semantically links the power to site with any nonbuilding activity or land use." *Id.* at 366. As a result, "the CCA does

not give counties the power to site a county 'activity' or county 'land use'; rather, it always relates its grant of siting power to 'buildings.'" *Id*. at 366-367. This Court found that the statutory language "must place significant limitations" on a county's siting power under the CCA. *Id*. at 367 (emphasis added). The *Herman* Court further wrote that "[b]ecause the county's authority is limited, the encroachment on a township's broad authority must be limited to that needed to effect the purpose of § 11(b) and (d)." *Id*. at 368 (emphasis added). In short, this Court clearly held in *Herman* that the statutory language reveals the Legislature's intent to place significant limitations on a county's siting power and further held that the siting power does not extend to siting activities or land uses.

In holding as outlined above, the *Herman* Court wrote that certain "ancillary" land uses such as sidewalks, parking lots and light poles may be included in a county's siting power if the ancillary land uses are indispensable to the normal use of a properly sited county building. *Herman*, 481 Mich at 368.[5] Appellants assert that the Court of Appeals erred by failing to consider whether utilizing the shooting range for firearms training was indispensable to the

[5] It is worth noting that the examples of ancillary "land uses" identified by the *Herman* Court (i.e. driveways, parking lots and light poles) are not actually "uses" of the land. Rather, they are incidental structures or improvements facilitating the reasonably convenient, safe and secure access to the county building by county employees and citizens providing and/or consuming services within the county building. In this sense, giving priority to the County for ancillary improvements to the land for access to the building is indispensable to allow the County to "make normal use of the building." If the Court is inclined to clarify the *Herman* test, Appellees respectfully submit it would be appropriate to clarify that only incidental structures or improvements necessary to facilitating the convenient, safe and secure access to a county building by county employees and/or citizens are included in a county's limited power to site county buildings under the CCA. *Herman* could just as easily have been decided on the grounds that the prohibition of outdoor shooting did not impair accesses to or use of the classroom training building. It is the failure to emphasize "access" in the test which allows the county to identify a structure which merely enhances or supports an activity and to argue that the structure is unusable without permitting the activity. Query whether the power to site a golf course halfway house empowers a county unfettered priority over the construction and operation of a golf course?

normal use of the new structure. Appellants' argument disregards the clear holding of *Herman* that only ancillary land uses such as sidewalks, parking lots and light poles are included in the County's limited siting power under the CCA as interpreted in *Herman*. As such, if a land use is not ancillary, it is irrelevant whether the land use is allegedly indispensable to the normal use of the building.

Based on the foregoing, any argument that the Court of Appeals failed to appropriately apply *Herman* to the facts of this case is unavailing. The Court of Appeals appropriately recognized that, if the land use of outdoor shooting is not ancillary, it cannot be included in the county's limited siting power under the CCA:

> The evidence shows that the shooting range was and is the main feature of this activity, making the building subordinate to, or ancillary to, the shooting range. The county's argument has the tail (a small structure) wagging the dog (the previously constructed and utilized range). Or, stated differently, the county used an after the fact building in an attempt to statutorily shield its non-conforming land use, something the *Herman* Court stated was impermissible under the CCA. No matter the intentions of the county in seeking to comply with *Herman*, the facts reveal a belated attempt to protect a land use by siting an adjacent building. This it cannot do.

Coloma, 317 Mich at 135 (emphasis added).

The Court of Appeals further appropriately recognized that "the purpose of the CCA is to allow counties priority over the TZA to build buildings and ancillary items to those buildings such as parking lots, shrubs and lighting, which are specifically adopted to support the use of the building." *Id* (emphasis added). In short, the Court of Appeals appropriately applied this Court's holding in *Herman* by analyzing whether use of the shooting range for firearms training constituted an ancillary land use or activity.

It is clear that the *Herman* Court utilized the term "ancillary" for a reason. As the Court of Appeals noted, the term ancillary is defined by dictionary as meaning "subordinate." *Id*. In

light of this definition, the Court of Appeals correctly concluded that utilizing the shooting ranges for firearms training is the main feature of the new structure erected by the County. Outdoor firearms training on the shooting range is clearly not ancillary or incidental to the new structure. Indeed, Appellants concede that discharge of firearms into the shooting range is the "sole use" for the new structure. Appellants' Brief, p. 18. If discharging firearms into the shooting range is the "sole use" of the new structure, it necessarily follows that discharging firearms into the shooting range cannot be a subordinate land use. The *Herman* Court's use of the term ancillary prevents a county from doing precisely what the County attempted to do in this case: erect a superfluous incidental structure for the sole purpose of siting an activity or land use in violation of a local zoning ordinance.

Appellants' position in this appeal appears to rest entirely on the mistaken assumption that the discharge of firearms on the shooting ranges is an ancillary land use under *Herman* simply because the shooting ranges are located on land adjacent to or surrounding the new structure. This assumption is illogical and finds no support in *Herman* or the language of the CCA. It is axiomatic that any land use will make use of land adjacent to and/or surrounding a legitimately cited county building. If the *Herman* Court had intended any use of the adjacent and/or surrounding land to be included in a county's limited siting power use of the term ancillary would have been unnecessary. Moreover, this Court did not state that "adjacent" or "surrounding" land uses indispensable to the normal use of an alleged county building are included in a county's limited siting power. Finally, if the *Herman* Court had intended for any use of adjacent and/or surrounding land to constitute an ancillary land use it would have been unnecessary for the Court to identify specific examples of ancillary land uses (sidewalks, driveways, parking lots and light poles). The *Herman* Court clearly held that only ancillary (i.e.

subordinate) land uses incidental to the main function of the building are included in a county's limited citing power under the CCA and confirmed the meaning of the term "ancillary" by providing specific examples.

Appellants find it "astounding" that the Court of Appeals did not explicitly consider the normal use of the new structure. Appellants' Brief, p. 14. Appellants further suggest that the County has unlimited "authority to determine the building's normal use." *Id*. at 19. While Appellees take issue with the notion that the County has unlimited authority to designate the "normal use" of an alleged county building, accepting Appellants' position that the normal use of the new structure is outdoor firearms training is unavailing to Appellants. It is implicit in the Court of Appeals' opinion that the majority assumed the normal use of the structure to be outdoor firearms training. That is why the Court of Appeals appropriately held that the new structure is "ancillary to the use of the shooting range, as opposed to the shooting range being ancillary to the normal use of the building." *Coloma*, 317 Mich App at 135. In short, accepting Appellants' contention that the normal use of the new structure is outdoor firearms training only serves to confirm that outdoor firearms training cannot be an ancillary use—it cannot be both the sole use of the building and an ancillary (i.e. subordinate) use.

Appellants claim that the Court of Appeals erred by considering the fact that the County constructed and utilized the gun ranges for outdoor firearms training prior to the erection of the new structure in 2013. Appellants contend that the "timing of the building's construction is not determinative of whether a use is ancillary or indispensable because the timing of the building's construction is irrelevant." Appellants' Brief, pp. 14-15 (citing *Herman*, 481 Mich at 355 fn. 3). Appellants assert that this Court "disposed" of the relevance of the "sequence of construction" in *Herman* and quotes footnote three of the *Herman* opinion as support. *Id*. at 20. Footnote three

of *Herman* does not support Appellants' claim. In footnote three, the *Herman* Court simply noted that it was not clear whether the County constructed the classroom building or the shooting ranges first. *Herman*, 481 Mich at 355, fn. 3. The Court merely noted that "the sequence of construction is not dispositive to our analysis." *Id*. Importantly, the Court did not state that the sequence of construction was irrelevant or that a history of engaging in the land use in question prior to construction of a county building should never be considered in future cases. Finally, the quote on page twenty of Appellants' Brief tellingly omits the final sentence of footnote three: "However, it is worth noting that the initial plans for the facility clearly indicate that the shooting ranges were the first and most prominent aspect of the facility to be constructed." *Id.* (emphasis added).

Nothing in *Herman* requires a lower court to apply the ancillary and indispensable test in a vacuum without any consideration of the underlying facts and circumstances surrounding the alleged county building and land use in question. In this case, the Court of Appeals appropriately considered the fact that shooting was the main feature/activity of the shooting ranges starting in 2005 and that the land use of firearms training had occurred on the shooting ranges prior to the erection of the new structure. This evidence is relevant to the question of whether the land use of firearms training can be considered ancillary (i.e. subordinate or incidental) to the new structure. The Court of Appeals appropriately considered the relevant factual history and the County's prior utilization of the shooting ranges for firearms training in determining that outdoor firearms training cannot be ancillary to the new structure.

Appellants oddly contend that the "interjected time-element essentially negates a County's option, or opportunity, to utilize any previously existing infrastructure as an ancillary part of a newly constructed building." Appellants' Brief, p. 15. To support this curious

statement, Appellants claim that "it is not unusual for a county to acquire land and use it as overflow parking while it determines how to best develop or construct a county building on the property." *Id*. at 15, fn. 22. Appellants further contend that if the land is utilized for parking prior to construction of a county building on the land, the parking facilities "could never be an indispensable use ancillary to the new building." *Id*.

Appellants' parking hypothetical is flawed and distinguishable from the facts at issue here. To begin, a county is not permitted to site and operate only a parking facility in violation of a township zoning ordinance under the CCA. Therefore, a county is subject to a local ordinance if it attempts to utilize land for "overflow parking" in the absence of a properly sited and erected county building. However, if the county were to erect a legitimate jail, clerk's office or courthouse on the land, parking facilities for employees and members of the public utilizing the building for indoor county business or services would constitute an ancillary land use even if the county had previously improperly utilized the land as a parking facility in violation of a local ordinance. This is so because the normal use of the properly cited jail, clerk's office and/or courthouse would be to conduct indoor county business and/or services and parking would be a subordinate land use supporting access of the building by employees and citizens performing and/or consuming the indoor county services.

Given Appellants' attempt to posit a parking lot hypothetical to support their position, it is helpful to consider a parking lot hypothetical actually analogous to the facts of the present case. Specifically, a county siting and constructing a parking lot and utilizing the parking lot for parking in violation of a local zoning ordinance would be analogous to the County's siting and utilizing the gun ranges in violation of the township zoning ordinance in this case. The County's erection of the new structure after being enjoined from utilizing the shooting ranges in this case

would be analogous to the county in the parking lot hypothetical erecting a small partially enclosed booth adjacent to the parking lot after being enjoined from utilizing the land as a parking lot. Under Appellants' interpretation in this case, it would be permissible for the county in the parking lot hypothetical to proclaim the small booth a "county building" and designate the "normal use" of the alleged building to be providing a space for an individual to monitor the parking lot and/or conduct transactions for those parking in the lot. In reality, the parking lot would not be ancillary to the partially enclosed booth as the sole purpose of the partially enclosed booth would be to facilitate the activity/land use of vehicle parking and to shield a pre-existing unlawful land use. The sequence of construction would not be fatal to the county's position. Rather, the fact that the sole purpose of the structure would be to facilitate the land use of outdoor parking would be fatal to the county's position.

The fact that Appellants' interpretation will greatly expand a county's siting power beyond the limited scope of the siting power intended by the Legislature and recognized by this Court in *Herman* is illustrated by considering hypotheticals. Under Appellants' interpretation, a county could construct a covered open-air grandstand and declare the normal use of the alleged "grandstand building" to be providing seating for observing outdoor racing. The county could then construct a racetrack on the land adjacent to the covered open-air grandstand and operate a racetrack in violation of local ordinances by claiming that utilizing the racetrack for outdoor racing was ancillary and indispensable to the previously constructed covered open-air grandstand. The county could further utilize the area adjacent to the grandstand to hold a monster truck rally, demolition derby or tractor pull.

Similarly, utilizing Appellants' interpretation in this case, a county could construct a covered open-air performing stage and declare the normal use of the alleged "performing stage

building" to be providing an area for musicians to perform. The county could then utilize the land adjacent to the covered open-air stage to hold outdoor concerts and music festivals in violation of the local ordinances by claiming that the land use of outdoor concerts/festivals is ancillary and indispensable to the normal use of the covered open-air stage.

Further, under Appellants' interpretation of the CCA and *Herman*, a county could operate a junkyard by erecting a small partially enclosed booth on the property and declaring the normal use of the alleged "junkyard monitoring building" to be providing a place for an employee to monitor the junkyard and facilitate exchanges of currency for parts from the junkyard. The county could argue that the normal use of the alleged "junkyard monitoring building" would be frustrated if the county could not utilize the surrounding property to operate a junkyard.

Finally, under Appellants' interpretation of the CCA and *Herman*, a county could construct a small partially enclosed structure and deem the structure a "golf course halfway house building." The county could then construct and operate an eighteen hole golf course in violation of a local zoning ordinance and contend that the normal use of the alleged county building is to provide and facilitate refreshment opportunities for golfers transitioning from the front nine to the back nine on the golf course. Utilizing Appellants' interpretation, the county could construct and operate the golf course by claiming that use of the surrounding premises for golfing is ancillary and indispensable to the normal use of the "golf course halfway house building."

These examples illustrate the absurdity of the County's position. It is plainly contrary to Legislative intent to allow a county to utilize a statute providing a limited power to site "county buildings" such as courthouses, jails and clerks' offices to engage in land uses such as outdoor shooting, junkyards, outdoor racing, county fairs, music festivals, golf courses and outdoor

concerts by erecting some form of incidental structure on the premises. Under Appellants' interpretation, a county's power to site activities and land uses under the CCA would be limited only by a county's imagination and ability to creatively contrive some form of incidental structure allegedly necessary to facilitate the land use or activity. Rather than placing "significant limitations" on a county's siting power consistent with legislative intent as recognized by this Court in *Herman* (*Herman*, 481 Mich at 367-368), Appellants' interpretation would drastically expand and effectively remove any limitation on a county's siting power under the CCA.

In sum, under *Dearden's* overarching maxim, "legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances." *Dearden*, 403 Mich at 264. This Court has held that the Legislature did not intend to give "counties the power to site a county 'activity' or county 'land use.'" *Herman*, 481 Mich at 366. Therefore, allowing a county to site an activity or land use by erecting an incidental structure the sole purpose of which is to facilitate the activity or land use would contravene and frustrate legislative intent. Allowing a county to site activities and land uses through erection of incidental structures would also frustrate the purpose of the MZEA and a township's ability to provide for its citizens' needs for "places of residence, recreation, industry, trade, service, and other uses of land." MCL 125.3201(1). The new structure is a charade and the Court need not abandon common sense when interpreting a statute to discern legislative intent. See *Marquis v Hartford Acc. & Indem.*, 444 Mich 638, 644; 513 NW2d 799 (1994).

III. THE COURT OF APPEALS CORRECTLY REVERSED THE TRIAL COURT'S MODIFICATION OF THE PERMANENT INJUNCTIVE ORDER.

Since the Court of Appeals correctly held that utilizing the gun ranges for firearms training is not an ancillary to the County's new structure under *Herman*, it necessarily follows that the Court of Appeals properly reversed the trial court's modification of the Injunction to allow firearms training on the gun range containing the new structure.

The trial court relied on MCR 2.612(C)(1)(e) to conclude that because of "changed circumstances" it was no longer equitable for the Injunction to have prospective application and that the Injunction should be modified to allow the BCSD to conduct outdoor firearms training on the range containing the new structure. (October 13, 2014 Opinion and Order, p. 4) **(Appendix 92b)**. The "changed circumstances" the trial court relied on in deciding that it was no longer equitable for the Injunction to have prospective application were the County's actions of erecting the new structure and use of the new structure for firearms training in violation of the Injunction and based on a strained interpretation of *Herman*. The trial court found that Plaintiffs established beyond any reasonable doubt that the County violated the Injunction. (December 10, 2014 Opinion & Order, p. 5) **(Appendix 120b)**. Notwithstanding the clear violation of the Injunction, the trial court rewarded the County's conduct by granting the County equitable relief and modifying the Injunction.

As outlined above, the Court of Appeals correctly reversed the trial court's finding that use of the new structure for firearms training was appropriate under *Herman*. The Court of Appeals' opinion implicitly recognizes that the alleged "changed circumstances" relied on by the County and trial court to justify modification of the Injunction were created by the County in

violation of the Injunction and for no other purpose than to shield a non-conforming land use by erecting an incidental structure.

It is an established maxim that one who comes into equity must come with clean hands. *Rose v National Auction Group, Inc*, 466 Mich 453, 460-461; 646 NW2d 455 (2002). The equitable doctrine of unclean hands acts to foreclose equitable relief to one tainted with inequitableness or bad faith relative to the matter upon which relief is sought. *Stachnik v Winkel,* 394 Mich 375, 382; 230 NW2d 529 (1975); *see also Rose, supra* at 463. The unclean hands doctrine may be "invoked by the Court in its discretion to protect the integrity of the Court." *Stachnik,* 394 Mich at 386; *see also Attorney General v Ankersen,* 148 Mich App 524, 544-545; 385 NW2d 658 (1986).

The County clearly overreached by utilizing the new structure for firearms training in violation of the Injunction and based on a strained interpretation of *Herman*. The fact that the County erected the new structure without notice to the Township or first seeking approval of the circuit court is evidence of bad faith. The chairperson of the BCAC Mr. Elliott, who was counsel for the County at the time of the entry of the Injunction, testified that he recalled at the time he voted in favor of the new structure that some form of order had been entered after remand from the Supreme Court. (Transcript of December 2, 2014 Bench Trial, p. 15) **(Appendix 104b)**. Instead of investigating the nature of the order entered on remand or seeking an opinion from the circuit court concerning whether erection of the new structure and resumption of firearms training would be appropriate under *Herman*, the County took the same "act first and litigate later approach" it has taken throughout the thirteen-year history of this costly and burdensome litigation. The purpose of the doctrine of unclean hands is "not to punish the wrongdoer, but to protect the courts from having to endorse or reward inequitable conduct." *Roger v Camuso,* 829

A2d 589, 609 (MD Ct App 2003). The County had unclean hands and should not have been awarded equitable relief based on the very conduct that gave it unclean hands in the first place.

IV. THE COURT OF APPEALS CORRECTLY VACATED THE TRIAL COURT'S RULING REGARDING ATTORNEY FEES WHERE APPELLEES ASSERTED A CLAIM OF PURE CONTEMPT BASED ON VIOLATION OF AN INJUNCTION.

After learning of the resumption of shooting on the gun ranges in 2013, Appellees properly sought enforcement of the Injunction through resort to the trial court's inherent power to enforce its orders through the power of contempt. Michigan courts have inherent authority to enforce their judgments and orders through contempt power:

> There is inherent power in the courts, to the full extent that it existed in the courts of England at the common law, independent of, as well as by reason of statute, which is merely declaratory and in affirmation thereof, to adjudge and punish for contempt….Such inherent power extends not only to contempt committed in the presence of the court, but also to constructive contempt arising from refusal of defendant to comply with an order of the court. Such power, being inherent and a part of the judicial power of constitutional courts, cannot be limited or taken away by an action of the legislature nor is it dependent on legislative provision for its validity or procedures to effectuate it.

In re Huff, 352 Mich 402, 415; 91 NW2d 613 (1958) (emphasis added). If an order or judgment has been violated, a party may ask the court to enforce the judgment or order through the power of contempt. See, e.g., *In re Hague*, 412 Mich 532, 545; 315 NW2d 524 (1982); MCL 600.1701(g).

MCL 600.1701 authorizes the Supreme Court, circuit courts and all other courts of record to wield contempt power. MCL 600.1701. MCL 600.1701 confirms that courts have the power to hold the persons identified in the statute in contempt for "any neglect or violation of duty or misconduct…." MCL 600.1701. The statute identifies the following as persons subject to a court's contempt power:

> (c) All attorneys, counselors, clerks, registers, sheriffs, coroners, and all other persons in any manner elected or appointed to perform any judicial or ministerial services, for any misbehavior in their office or trust, or for any willful neglect or violation of duty, for disobedience of any process of the court, any lawful order of the court, or any lawful order of a judge of the court or any officer authorized to perform the duties of the judge.

MCL 600.1701(c) (emphasis added). Based on the foregoing, any attorney, sheriff or person elected to perform ministerial services (i.e. a county commissioner) may be held in contempt for a willful neglect of duty or disobedience of any lawful court order.

Appellees followed the proper procedure in seeking enforcement of the Injunction through the trial court's contempt power including filing a motion pursuant to MCR 3.306(A), obtaining a show cause order and appearing at an evidentiary hearing. As part of the motion to enforce the Injunction filed on or about November 14, 2013, Appellees asked the trial court to award them costs and attorneys' fees incurred in connection with their efforts to enforce the Injunction. MCL 600.1721 specifically provides that if "the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him." MCL 600.1721. The language of MCL 600.1721 does not specify whether it applies to findings of civil contempt, criminal contempt, or both. The Court of Appeals has recognized that a loss under MCL 600.1721 may include attorney fees that occurred as a result of the other party's contemptuous conduct. *Plumbers & Pipefitters Local Union No. 190 v Wolff*, 141 Mich App 815, 818; 369 NW2d 237 (1985); *Taylor v Currie*, 277 Mich App 85, 100; 743 NW2d 571 (2008). In *Taylor*, the Court of Appeals held that MCL 600.1721 permitted an award of attorney fees in the context of a finding of criminal contempt. *Taylor*, 277 Mich App at 100.

The contempt at issue in this case is pure contempt with no arguable underlying tort claim. The County violated an injunctive order entered after Appellees prevailed in an action seeking equitable declaratory relief. Contempt is an act that undermines, challenges or threatens a court's effectiveness and authority. See *In re Contempt of Auto Club Ins.*, 243 Mich App 697, 708; 624 NW2d 443 (2001). Courts have defined contempt as a "willful act, omission, or statement that tends to . . . impede the functioning of a court." *Contempt of Auto Club*, 243 Mich App at 708 quoting *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995). The "primary purpose of the contempt power is to preserve the effectiveness and sustain the power of the courts." *Id*. In short, contempt is unique in that it involves a public wrong tantamount to a challenge to the power and effectiveness of the Court.

The trial court failed to address Appellees' contempt claims following the December 5, 2013 evidentiary hearing where the County had been ordered to show cause why it should not be held in contempt. Instead, the circuit court issued an opinion and order that modified the Injunction on a preliminary basis to allow the new structure to be utilized for firearms training three days per week.

Following issuance of the preliminary order on January 17, 2014 and trial court set a scheduling conference and issued a scheduling order. Following issuance of the scheduling order, the County filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10) seeking dismissal of the contempt claims. At the time of the hearing, the trial court denied the County's motion for summary disposition of the criminal contempt claim finding that questions of fact precluded summary disposition under MCR 2.116(C)(10). (Transcript of May 19, 2014 Hearing, p. 6.) (**Appendix 124b**). The trial court found as follows regarding the (C)(7) portion of the motion:

> I grant the remainder of the motion under (C)(7), governmental immunity. I think those are the very types of fees and expenses that were talked about in the Bradley Estate case, and that they are in effect tort damages and that the County as an entity is entitled to absolute immunity on that claim, regardless of the nature of the tort may be.

Id. at 7.

The court entered an order reflecting this ruling on August 20, 2014. (August 20, 2014 Order) **(Appendix 82b-83b)**. In short, the circuit court never ruled on Appellees' civil contempt claim and found that the GTLA precluded an award of attorney fees against the County.

The trial court's ruling finding the County immune from an award of attorney fees was based on an overly broad interpretation of *Bradley Estate*. *Bradley Estate* involved the Kent County Sheriff's Department's ("KCSD") failure to execute an order from the probate court to take Stephen Bradley into custody. Mr. Bradley took his own life nine days after the entry of the probate court order. Mr. Bradley's estate initially brought a tort action in circuit court against the KCSD seeking damages under the Wrongful Death Act but the circuit court dismissed the action on governmental immunity grounds. *Bradley Estate,* 494 Mich at 373-374. Following the circuit court's dismissal of the wrongful death claim, the estate filed a petition for civil contempt in probate court which "replicated the contents of petitioner's wrongful death complaint and sought damages 'including but not limited to, all those damages set forth in the Michigan Wrongful Death Statute, MCL 600.2922, et seq." *Id*. at 374. In other words, the plaintiff in *Bradley Estate* simply refiled its prior wrongful death tort action and sought the same damages under the Wrongful Death Act it had sought in the previously dismissed tort action.

The facts of the present case are entirely different from those at issue in *Bradley Estate*. First, the contempt at issue in *Bradley Estate* involved an alleged delay in performing an act

commanded by an order entered by a probate court.[6] The contempt in this case involves violation of an injunctive order after five years of compliance with the order. Most importantly, the plaintiff in *Bradley Estate* sought wrongful death damages based on an underlying tort claim which had already been dismissed on governmental immunity grounds. In the present case, Appellees simply asked the trial court to order the County to pay the attorney fees they incurred in seeking enforcement of the Injunction. In other words, Appellees' claim was for pure contempt with no arguable underlying tort claim.

This Court held in *Bradley Estate* that the phrase "tort liability" from the GTLA encompasses "legal responsibility arising from a tort." *Bradley Estate*, 494 Mich at 387 (emphasis added). The Court defined the term "tort" to mean a "noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages." *Id*. at 385. Appellees were clearly not seeking to use the indemnification provision of MCL 600.1721 as an alternative method for asserting a tort claim against the County as did the plaintiff in *Bradley Estate*. The County's potential liability for Appellees' attorney fees does not "arise from a tort." Rather, the County's liability arises from a quasi-criminal or public wrong and disregard of the Court's authority through violation of an injunction. There is no arguable tort or civil wrong in this case

[6] Given that the subject of the order in *Bradley Estate* was deceased, it was no longer possible for the KCSD to comply with the probate order in question by taking the subject into custody. Therefore, a coercive sanction was impossible at the time the estate filed the civil contempt petition. Given that courts generally attempt to distinguish civil and criminal contempt by considering whether the sanction imposed is coercive (civil) or punitive (criminal) (*DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007) it is not entirely clear why the claim in *Bradley Estate* was framed and treated as one for civil contempt. MCL 600.1721 does not distinguish between civil and criminal contempt and the Court of Appeals has found that attorney fees can be awarded under MCL 600.1721 in connection with a finding of criminal contempt. *Taylor*, 277 Mich App at 580. In any event, the distinction between civil and criminal contempt does not lead to the conclusion that civil contempt is a tort as the underlying conduct does not appear to determine whether the contempt is treated as civil or criminal.

and, as such, *Bradley Estate's* holding regarding "tort liability" should have no application to Appellees' request for attorney fees incurred as a result of the County's pure contempt.

Justice McCormack authored a lengthy dissent in *Bradley Estate* outlining the *sui generis* nature of contempt. In her dissent, Justice McCormack opined that:

> Contempt of court is altogether different. It stems from a violation of an obligation owed not to any person, but to the court itself. Contempt does not serve to protect private rights; it serves to protect the power of the courts. Contempt has been described as a 'power of self-defense,' intended to sanction 'those who interfere with orderly conduct of [court] business or disobey orders necessary to the conduct of that business….

Bradley Estate, 494 Mich at 569 (MCCORMACK, J., dissenting). Justice McCormack further wrote that:

> Modern Michigan cases have recognized contempt proceedings as 'quasi-criminal.' Nor is Michigan alone. The United States Supreme Court has described contempt proceedings as '*sui generis*—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions.' They 'are neither wholly civil nor altogether criminal.' Rather, an action of contempt 'may partake of the characteristics of both.'

Id. at 570 (citations omitted). As summarized above, contempt is unique, neither wholly civil nor criminal and constitutes a violation of an obligation to the court rather than a private party.

The majority in *Bradley Estate* suggested that it agreed with Judge McCormack's discussion regarding the nature of contempt and that a case involving pure contempt may be excluded from the scope of its holding which was based on the "nuanced" facts of the case before it:

> Justice MCCORMACK pens an eloquent and engaging discussion of the sui generis nature of contempt, one that we do not necessarily disagree with regarding *contempt*. Where we do differ, however, is in our belief that this case presents a more nuanced

> issue, namely, whether a petitioner can recast a wrongful death claim that is barred by the GTLA as a claim for civil contempt and obtain indemnification damages under MCL 600.1721, which are exactly the same as those damages sought under the wrongful death statute. We see the issue differently, but have not 'confuse[d] legal categories' in the least.

Bradley Estate, 494 Mich at 389, fn 52. (Emphasis in original). In the foregoing quote, this Court suggested that the scope of its holding in *Bradley Estate* did not extend to cases of pure contempt distinguishable from the "nuanced" facts of the case before it. The Court bolstered this suggestion in a subsequent footnote where it wrote:

> We do not disagree with the concern that this Court must safeguard the power of the judicial branch, but note that this case did not involve the willful violation of a court order and the consequential offense to the issuing court, which is the very essence of contempt of court.

Id. at 561, fn. 69. In contrast to *Bradley Estate*, this case does involve a willful violation of an injunctive order and the consequential offense to the issuing court (even if the court failed to recognize and/or appreciate the offense).

Justice McCormack prophetically wrote that the potential breadth with which the majority's holding could be construed (even if inconsistent with the majority's intent as expressed in footnotes 52 and 69) would result in application of the holding to future cases involving claims of pure contempt with no arguable underlying tort:

> As a matter of good doctrinal bookkeeping, civil contempt is not the same as tort liability. Although the majority is correct that, as it happens, petitioner seeks indemnification under the contempt statute after having been denied a claim for wrongful death, the majority's holding will also apply to future cases in which, unlike here, a governmental actor's contemptuous conduct has no obvious tort analogue simply because the sanction can be viewed as compensatory.
>
> But even beyond getting the basic legal categories here correct, this Court should be hesitate to cede the judiciary's power to impose exceptional remedies in those exceptional cases in which

> they may be warranted for failure to heed judicial orders. This Court should, instead, safeguard the power of the judicial branch. No other branch will.

Id. at 575 (MCCORMACK, J., dissenting) (emphasis added).

In this case, the County's contemptuous behavior has no obvious (or even arguable) tort analogue as Appellees sought recovery of attorney fees incurred in attempting to address the County's violation of an injunction entered in an action seeking equitable declaratory relief. There is no sound policy rationale for extending immunity to government actors for indemnification damages where the government actor actively violates a court order and where the circumstances present no arguable underlying tort claim "disguised" as a contempt claim. The Michigan Court Rules provide for sanctions where a party files a frivolous pleading or motion and where a party engages in discovery abuses. These sanctions may include the payment of money to the opposing party to reimburse the party for the costs and fees incurred in responding to the frivolous pleading, motion or discovery requests. See, e.g., MCR 2.114(E); MCR 2.223(B) & MCR 2.313(D). The costs and fees provided by these court rules may imposed on governmental actors and, like the attorney fees sought by Appellees in this case, do not "arise from tort."

As for the County's contemptuous behavior, it is undisputed that the County violated the Injunction by erecting the new structure and conducting firearms training on eight separate occasions in September, October and November of 2013. The County, as a municipal corporation, acts through its agents. *In re Kennison Sales & Engineering Co, Inc*, 363 Mich 612, 617; 110 NW2d 579 (1961). When an individual representing a corporate entity acts within the scope of the individual's representation the knowledge acquired by the individual in the scope of the representation is imputed to the corporation. *New Properties Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 134; 762 NW2d 178 (2009). As this Court has determined:

> The knowledge possessed by a corporation about a particular thing is the sum total of all the knowledge which its officers and agents who are authorized and charged with the doing of the particular thing[,] [acquire] while acting under and within the scope of their authority.

Upjohn Co v New Hampshire Ins Co, 438 Mich 197, 214; 476 NW2d 392 (1991).

As the principal, the County is responsible for the actions of its agents and the knowledge of its agents is imputed to the County. It is undisputed that Mr. Elliott was corporate counsel for the County at the time the Injunction was entered on November 10, 2008. It is further undisputed that the copy of the Injunction entered in the Berrien County Circuit Court file bears Mr. Elliott's signature. (2008 Permanent Injunctive Order) **(Appendix 5a-7a)**. It is further undisputed that Mr. Elliott acted as Chairman of the BCAC that recommended erection of the structure to facilitate the resumption of firearms training at the shooting ranges in August of 2013. Therefore, Mr. Elliott qualified as a person "elected to perform . . . ministerial services" within the meaning of MCL 600.1701(c) when he chaired the committee recommending erection of the new structure. Mr. Elliott conceded in his affidavit dated November 21, 2013 that he voted in favor of construction of the open-air structure "with the anticipated use of that one range by the Sheriff's Office for law enforcement firearms qualification training." (R. McKinley Elliott Affidavit) **(Appendix 57b-58b)**. As such, Mr. Elliot conceded that he understood at the time he voted in favor of construction of the new structure that the structure would be used to resume firearms training at the shooting ranges.

While Mr. Elliott did his best to adhere to the "I did not recall" position at the time of the December 2, 2014 bench trial, he conceded that he was aware <u>in August of 2013</u> that an order had been entered by the circuit court after remand from the Supreme Court:

> Q: So—so your testimony is that—that it could have been entered, but you did not recall it?

> A: My testimony is that I knew that Jude [sic] Dewane had entered an order when the case came back from the Supreme Court because I think that they remand cases and tell the trial court to do things consistent with the opinion of the court. And typically that means entering a decision for someone against someone. So I was aware of that.

(December 2, 2014 Transcript, p. 15) **(Appendix 104b)**.

Mr. Elliott further testified that he recalls discussing the Injunction with Plaintiffs' counsel and sending Plaintiffs' counsel a signed signature page. *Id*. at 16 **(Appendix 105b)**. Mr. Elliott further testified that he expected that the signature page would be attached to the order and filed with the court:

> Q: And if you had given a signature page and it was appended to an order, what would you expect to happen to that signature page and order?
>
> A: I would expect him to turn it in.
>
> Q: To—file it with the court?
>
> A: Sure.

Id. at 16-17 **(Appendix 105b – 106b)**. Following the entry of the Injunction by the court, Appellees' former co-counsel Mark Westrate sent a copy of the entered Injunction to Mr. Elliott. (November 17, 2008 Correspondence) **(Appendix 28b)**.[7]

[7] The trial court refused to consider this correspondence based on the fact that the letter was signed only with the symbol "/s/". (December 2, 2014 Transcript, pp. 30-32) **(Appendix 113b-115b)**. The trial court found that the document was not "authenticated." *Id*. at 32 **(Appendix 115b)**. Appellees respectfully contend that there was "evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901. Authentication can be established through "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." MRE 901(4). The November 17, 2008 correspondence bears the letterhead of Appellees' former co-counsel Mark Westrate. (November 17, 2008 Correspondence) **(Appendix 28b)**. Moreover, Mr. Elliott conceded during his testimony that he recalls discussing the language of the Permanent Injunctive Order with Mark Westrate a matter of days prior to the date on the letter (December 2, 2014 Transcript, pp. 26-30) **(Appendix 109b-113b)**. Moreover, Mr. Elliott confirmed that Mark Westrate's secretary's name at the time was Lisa Withers (*Id*. at 23-24) **(Appendix 107b-108b)** and the initials "LW" appear next to Mr. Westrate's initials "MAW" on the letter. (November 17, 2008 Correspondence) **(Appendix 28b).** Mr. Westrate died prior to the resumption of this litigation

Based on the foregoing, Mr. Elliott confirmed that he was aware in August of 2013 that the circuit court had entered an order in favor of Plaintiffs and against the County after remand from the Supreme Court. While Mr. Elliott claimed that he did not recall receiving a copy of the Injunction after it had been entered by the court, his testimony plainly established that he discussed the terms of the Injunction with opposing counsel and subsequently sent opposing counsel a signed signature page with the expectation that the it would be attached to the order and submitted to the court for entry.

Appellees respectfully submit that the foregoing testimony is sufficient to establish beyond a reasonable doubt that Mr. Elliott had knowledge of the entry of the Injunction in November of 2008. If Mr. Elliott had knowledge of the entry of the Injunction in November of 2008, that knowledge was imputed to the County and continued to be imputed to the County in August of 2013 when the County approved and erected the structure for the express purpose of resuming outdoor firearms training in violation of the Injunction and *Herman*. As noted by the trial court, the term "willful" is defined as the "[t]he intentional violation or disregard of a known legal duty." Black's Law Dictionary (9th ed). The testimony outlined above demonstrates that Mr. Elliott (and by extension the County) disregarded a known legal duty in August of 2013 by approving erection of the structure with knowledge that the structure would be utilized for resuming outdoor shooting despite having constructive knowledge that the circuit court had entered an injunctive order in the case in favor of Plaintiffs after remand from this Court. At minimum, Mr. Elliott (and by extension the County) disregarded a known legal duty to verify the terms of the final injunctive order entered by the circuit court after remand from the Supreme

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in December of 2013. Taken in conjunction with the circumstances, the appearance, contents and distinctive characteristics of the letter were sufficient to authenticate the document under MRE 901.

Court before erecting and utilizing the new structure. In short, the evidence presented established beyond any reasonable doubt that Mr. Elliott (and by extension the County) engaged in willful neglect of duty and disobedience of a lawful order of the court within the meaning of MCL 600.1721 in connection with the undisputed violation of the Injunction.

RELIEF REQUESTED

Appellees respectfully request that this Court affirm the holding of the Court of Appeals and remand the case to the circuit court for entry of an award of reasonable attorney fees to Appellees.

Respectfully submitted,

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Dated: December 19, 2017

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